Supreme Court of the United States

OCTOBER TERM, 1942

No. 694

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,
Petitioner,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. D. DRISCOLL,
H. RUSSELL BISHOP,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Burrus Mill & Elevator Company of Oklahoma, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered herein on November 2, 1942 (R. 266-271).

STATEMENT.

This was an action to recover freight overcharges for the transportation of certain carloads of wheat from St. Louis, Missouri, through Enid and Kingfisher, Oklahoma, where it was stored and milled into flour, to Memphis, Tennessee. The action was commenced in the District Court of Kingfisher County, Oklahoma, and was removed upon petition

of respondents to the District Court of the United States for the Western District of Oklahoma.

The petitioner, an Oklahoma corporation, is engaged in the business of buying wheat and milling it into flour at its mill located at Kingfisher. In July and August, 1935, petitioner purchased 106 carloads of wheat in St. Louis, Missouri, and shipped certain of them over respondents' line to its mill at Kingfisher, where the wheat was milled into flour, and others to Enid where they were stored and later moved to Kingfisher for milling. During the same period petitioner shipped over respondents' line from Kingfisher to Memphis, Tennessee, 211 carloads of flour, which is the same amount of tonnage as 106 carloads of wheat. (Stipulation of Facts, R. 47-48.)

During the period in question, July-August, 1935, the respondents' legal proportional rate, published in their tariff on wheat and flour in carloads, from St. Louis to Memphis was 11 cents per hundred pounds. (R. 62.) Under respondents' transit tariffs, transit privileges of two stops in transit for storing or milling, free of charge, were permitted. (Finding of Facts, R. 253.) On August 5, 1935, the petitioner's traffic manager inquired of respondents by telephone and telegram if petitioner's understanding that the transit privilege was available at Kingfisher on the 11 cent rate on shipments from St. Louis to Memphis through Kingfisher, and was advised by respondents that it was. On August 7, 1935, respondents advised that in correction of their wire of August 5, that a combination of rates equaling 34 cents must be charged instead of the 11 cent rate set forth in the tariff. (R. 59.) The 34 cent rate was exacted by respondents and the action was brought to recover the difference between the charge as made and as it would have been if the 11 cent rate had been applied.

One of the Transit Tariffs of the respondents contained among other things Item 20 which read as follows:

> "Shipments passing through or stopped at points from which proportional rates are published shall be charged

the combination of rates to and from each proportional rate point on the route of movement. (See Exception, Item No. 12).

EXCEPTION.—Where the lowest combination of rates via a route to and from one proportional rate point has been published for application over another route which passes through one or more proportional rate points, transit may be given at intermediate points on the latter route on basis of the lowest rate applicable. The transit point shall be intermediate on the route first described." (R. 117.)

The District Court found that under the terms of the tariff transit privileges were not available at Enid and Kingfisher on the shipments involved in this case on the 11 cent rate; that the exception to Item 20 did not apply and that the shipments in question did not come within the purview of the exception; that the rate of 34 cents was the lowest applicable rate as a component factor of the through combination rate for each of the shipments from the origin beyond St. Louis to the destination beyond Memphis with transit at either or both Enid or Kingfisher, Oklahoma. (Finding of Facts, R. 253.) The Court concluded that the tariffs were clear and unambiguous and could not be construed as authorizing any rate on the shipments involved lower than that constructed by using 34 cents per one hundred pounds, and that the rate of 11 cents was not applicable and the plaintiff should recover nothing. (Conclusions of Law, R. 254-255.)

The judgment of the District Court was entered on May 17, 1941, and the petitioner on May 27, 1941 filed a motion to amend the finding of facts and the conclusions of law, and a motion for a new trial. The motions were argued on July 21, 1941, and on September 29, 1941, the District Court entered its order denying the said motions. (R. 255-260.)

An appeal was taken to the Circuit Court of Appeals for the Tenth Circuit, briefs were filed and the case was argued.

On November 2, 1942, the Circuit Court of Appeals affirmed the judgment of the District Court, holding that the exception to Item 20 had no application to the shipments in question and the tariff was not ambiguous.

STATUTES INVOLVED.

This case does not involve the construction of any statutes.

QUESTIONS PRESENTED.

I

Should not an item in a freight tariff which purports to determine the rates to be charged, be indexed and so placed in the tariff that it will be read with all other provisions relating to the rates to be applied if it is to be given the intended effect of determining the rates?

II

In view of the express language of respondents' tariffs, did not the 11 cent rate apply because it was the legal, published rate?

III

Are not the tariff provisions involved in this controversy ambiguous and, therefore, to be construed in favor of the shipper?

PETITIONER'S POSITION.

Petitioner contends that the only charge which could be legally exacted for the shipments in question was that which was constructed by using the rate of 11 cents per one hundred pounds from St. Louis to Memphis, as this was the only proportional rate from and to those points which was set forth in the tariff. The provisions of Item 20 in no way served to change the applicability of the 11 cent rate because Item 20 was so placed or indexed in the tariff that it would not be read with other provisions relating to the

rates to be applied. It was only by merest chance that anyone reading the tariff would learn that Item 20 had any bearing upon rates to be charged, and it, therefore, could not be given the effect of determining the rate. Furthermore, the exception to Item 20 can not be construed as preventing its application to the shipments here involved; therefore, Item 20 did not interfere with the application of the 11 cent rate as the factor for the St. Louis to Memphis portion of the movement.

The tariffs of the respondents viewed in the most favorable light to the respondents are ambiguous and, therefore, require the application of the 11 cent rate under the well established rule that ambiguities in tariffs must be resolved in favor of shippers.

REASONS FOR GRANTING THE WRIT.

In this case the District Court and the Circuit Court of Appeals have disregarded the settled doctrine relating to the construction of freight tariffs which has been developed by the Interstate Commerce Commission, the Circuit Courts of Appeals of other circuits and approved by this Court. While paying lip service to the rule that ambiguities in tariffs are to be resolved in favor of the shipper (*Northwest Steel Company* v. *Director General*, 68 I. C. C. 195; *Sutherland Flour Mills Co.* v. *Director General*, 81 I. C. C. 366; *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Updike Grain Co.* v. *Chicago & North Western Railway Co.*, 35 F. (2d) 486; *Atlantic Coast Line Railroad Co.* v. *Atlantic Bridge Co.*, 57 F. (2d) 654; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Southern Pacific Co.* v. *United States*, 237 U. S. 202) the Circuit Court of Appeals has decided this case contrary to the holdings of the above cited cases by the holding that there is no "substantial" ambiguity. This results in the decision of a substantial Federal question concerning the proper construction of tariffs used in interstate commerce in a way contrary to principles set forth

in decisions of this Court, the Interstate Commerce Commission and other Federal Courts.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit be granted.

H. D. Driscoll,
H. Russell Bishop,
Attorneys for Petitioner.